

Requiring broadcasters to count promotions of upcoming programs as commercial matter certainly will reduce the number of such promotions in children's programming, as the Commission intended. But, contrary to the Commission's unsupported assumptions and conclusions, this result will not benefit children. Instead, children will be deprived of the information they need to find and watch high-quality, informative and entertaining programming that does not meet the definition of "educational and informational" programming³ but nevertheless serves their needs and interests.

The NBC and Telemundo programming networks exercise care in their selection of programs to promote within children's television programming blocks to ensure that children are guided to suitable programming. For example, NBC includes within children's programming blocks promotions for its critically acclaimed and Emmy award-winning series "American Dreams." This program is set against the turbulent landscape of the 1960s and depicts a family struggling with all of the issues of that era, which continue to resonate in our own time, including the Vietnam war, racism and feminism. "American Dreams" thus provides an excellent vehicle for thought-provoking discussions of these important issues among parents and children who watch the program together. The promotional announcements included in children's programming blocks inform young viewers about upcoming episodes and thus stimulate their interest in watching the program with their parents. Because "American Dreams" is intended for a wide general audience, however, it does not qualify as educational and informational programming. Therefore, these promotions will be counted as commercial matter under the revised definition of commercial matter.

³ Such programming must have "serving the educational and informational needs of children 16 years of age and under as a significant purpose." 47 C.F.R. § 73.671(c)(1). Programming intended to serve a wider audience (including parents and children watching together) generally does not meet this requirement.

Similarly, most of the news (including local news) and sports programming broadcast on television stations would not qualify as educational and informational because such programming is not specifically designed to serve the educational and informational needs of children 16 years of age and under. Rather, most news and sports programming is intended for a much wider general audience comprised of both children and adults. Accordingly, promotions of upcoming sporting events or international, news-making competitions, including such notable programming as coverage of the summer and winter Olympics,⁴ or even the NBC Nightly News, would be treated as commercial matter under the new definition. Because of the strict commercial limits applicable to children's programming, broadcasters are therefore likely to forego promotion of sports, news and other programming that children want to see and from which they derive real benefit.

The Commission justifies this draconian result on the ground that it will reduce the number of interruptions in children's programming and protect children from overcommercialization. Yet the *Report and Order* offers no factual support whatsoever for the Commission's contention that program promotions lead to "overcommercialization." Instead, the *Report and Order*, citing the *Notice of Proposed Rule Making*, states without record support that "[w]e observed in the *Notice* that there is a significant amount of time devoted to these types of announcements in children's programming"⁵ This statement is nothing more than a verbatim recitation of the identical, and equally unsupported, statement in the *Notice* that "[w]e have observed that there is a significant amount of time devoted to these types of announcements

⁴ As discussed in detail in the Joint Petition, the Commission's children's programming policies should promote and accommodate both children's programming and highly popular sports programming, including broadcasts of international competitions such as the Olympics, by allowing flexibility in its implementation of its new preemption rule.

⁵ *Report and Order*, ¶ 55 (citation omitted).

in children's programming"⁶ Thus, neither the *Notice* nor the *Report and Order* cites to any record evidence whatsoever indicating that program promotions have led to excessive commercialization or, for that matter, any other harm to children.

The total absence of record support for the revised definition of commercial matter demonstrates that the new rule – without offering any corresponding benefit – will deprive children of the very information they need to find high-quality, educational and entertaining programming that may not meet the Commission's definition of "educational and informational programming." This is particularly so because children depend much more heavily than adults on program promotions to apprise them of upcoming programming. Children are far less likely to plan their television viewing ahead by consulting a printed or onscreen program guide to identify upcoming programs they may want to watch. Therefore, if program promotions are substantially reduced or eliminated to comply with the commercial limits, children will be harmed, not helped, because they will be unable to locate and watch beneficial programs.⁷

When the FCC adopted the commercial limits for children's programming in response to the Children's Television Act of 1990, it properly recognized that "commercial matter" referred to air time sold for the purpose of selling a product or a service.⁸ The Commission attempts to force its new interpretation of "commercial matter" into this common-sense definition by arguing that broadcasters receive consideration for these promotions in the form of increased ratings for

⁶ Notice of Proposed Rulemaking, *Children's Television Obligations of Digital Television Broadcasters*, 15 FCC Rcd 22946, 22959 ¶ 33 (2000) ("*Notice*").

⁷ The new rule appears to include within its scope even mentions of upcoming episodes of the very same program in which the mention is included if that program is not categorized as educational and informational. If this interpretation is correct, it is equally misguided because it deprives children of useful information about the programs they watch.

⁸ Report and Order, *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2112 ¶ 4 (1991) (citation omitted); Notice of Proposed Rulemaking, *Policies and Rules Concerning Children's Television Programming*, 5 FCC Rcd 7199, 7199 ¶ 3 (1990) ("*1990 NPRM*").

the station's programming, which converts to increased advertising rates in the promoted programs. Despite the Commission's contorted reasoning, promotions for upcoming programs clearly do not involve the selling of a product or service. Moreover, the Commission's factual premise for concluding that stations receive "consideration" in the form of increased advertising rates for the promoted programs is simply wrong. Much advertising targets demographics that do not include children at all. The target demographic for ratings, which in turn determines many critical advertising rates, is adults 18 to 49 years old. Broadcast stations do not expect and do not rely on ratings increases flowing from program promotions presented in children's programming blocks to boost advertising rates for such general audience programming.

Further, the rationale that promoting programming is commercial because it increases advertising rates for that programming applies equally to children's educational and informational programming; yet the Commission correctly will continue to treat promotions for educational and informational programming – even that which appears only on pay television networks – as noncommercial promotional material. That is undoubtedly the correct result for children. However, this is also the appropriate result for promotions of other types of high-quality, informative and entertaining programming, such as the programs described above, that does not qualify as "educational and informational" but nevertheless serves the needs and interests of children. The Commission would be better served by refusing to rely on this rationale.

The Commission's attempt to liken program promotions to promotions for or on behalf of another commonly owned or controlled broadcast station is also unpersuasive.⁹ According to the Commission, this argument derives from the legislative history of the Children's Television Act,

⁹ *Report and Order*, ¶ 59.

which indicated that the definition of “commercial matter” to be adopted by the Commission should be consistent with the definition used in former Form 303-C.¹⁰ That superseded form defined commercial matter to include promotions for another commonly owned broadcast station serving the same community and certain other types of promotional announcements, including promotions for future programs where consideration was received or a sponsor was identified.¹¹ The superseded form did not treat as commercial matter announcements of future programs where no consideration was received and no sponsor names were mentioned. The promotional announcements described above that will now be treated as commercial matter under the revised definition do not meet the definition of commercial matter used in former Form 303-C. Therefore, the legislative history relied upon by the Commission does not support its conclusion. Moreover, the analogy drawn by the Commission is inapt – promoting another commonly owned broadcast station is clearly not the same thing as guiding children to beneficial programming in which they have a strong interest.

¹⁰ Children’s Television Act of 1989, House Committee on Energy and Commerce, H.R. Rep. No. 385, 101st Cong., 1st Sess. 15-16 (1989); Children’s Television Act of 1989, Senate Committee on Commerce, Science and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 21 (1989).

¹¹ Former FCC Form 303, § III.1.C; 47 C.F.R. § 73.670 n. 3 & 4 (1976 ed.) (superseded); *see 1990 NPRM*, 5 FCC Rcd at 7199 n.10. (“Included in the definition of “commercial matter” were “bonus spots”; “trade-out spots”; and promotional announcements (1) on behalf of another commonly controlled broadcast station serving the same community and (2) of a future program where consideration was received for the announcement or where the announcement identified the program sponsor beyond mention of the sponsor’s name as an integral part of the program title. Excluded were all other promotional announcements; station identification announcements for which no charge was made; mechanical reproduction announcements; public service announcements; announcements made pursuant to Section 73.1212(d) of [the FCC’s] Rules that materials or services have been furnished as an inducement to broadcast a political program; and announcements involving the local public notice requirements of [the FCC’s] Rules.”)

CONCLUSION

For the foregoing reasons, the Commission should abandon the revised definition of “commercial matter” adopted in the *Report and Order* and should continue to rely on the common-sense definition developed in 1991 in response to the Children’s Television Act, which focuses on the sale of air time for the purpose of selling a product or service.

Respectfully submitted,

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